

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

ETERNAL INVESTMENTS, LLC,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 05-0521-CV-W-FJG
)	
THE CITY OF LEE'S SUMMIT,)	
MISSOURI,)	
)	
Defendant.)	

DEFENDANT'S MOTION TO FILE SURREPLY
TO PLAINTIFF'S REPLY BRIEF (DOC. 180)

COMES NOW, Defendant City of Lee's Summit, Missouri, by and through its attorneys of record, and moves this Court for leave to file a surreply to plaintiff's reply brief (Doc. 180). In support of its motion, the City states as follows:

1. On October 18, 2006, this Court issued its Order requiring the parties to brief their respective positions on five questions identified by the Court. The Court identified a briefing schedule whereby the plaintiff was to file its initial brief by October 27, 2006, the City was to file its response by November 6, 2006, and the plaintiff was to file its reply by November 14, 2006.
2. The parties filed their respective briefs in accordance with the Court's schedule; however, the plaintiff did not confine its reply brief to issues addressed in the City's response. Rather, the plaintiff addressed new issues that were not even included in its original brief.

3. In particular, the plaintiff took the new position that it is somehow entitled to a *sua sponte* declaration of summary judgment on its equal protection claim. *See* Plaintiff's Reply, at 2-4. The plaintiff's position in this regard is frivolous; yet since it did not make its position clear in its original brief, the City has not had an opportunity to respond. Accordingly, the City requests an opportunity to briefly respond to this argument.

4. In the remainder of its reply, the plaintiff attempts to raise the specter of new arguments; however, they have for the most part been waived – as in the instance of the plaintiff's agreement to abide by the market rate of return calculation. *See* Plaintiff's Brief (Doc. 178), at 5-6. While it is tempting to request leave to respond to this category of issues, the plaintiff's waiver is obvious and requires no further explication.

5. The City seeks this Court's order granting leave to file a surreply for the purpose of responding to the plaintiff's assertion of entitlement to a *sua sponte* declaration of summary judgment. The City's proposed reply is attached hereto as Exhibit A.

WHEREFORE, the City of Lee's Summit prays this Court's order granting leave to file a surreply to the plaintiff's reply (Doc. 180).

Respectfully submitted,

SHERMAN TAFF BANGERT
THOMAS & CORONADO, P.C.

By: /s/ Mark D. Katz

Steven F. Coronado MBN 36392

Mark D. Katz MBN 35776

Kevin D. Brooks MBN 57627

1100 Main Street, Suite 2890

Kansas City, Missouri 64105-2112

Telephone: (816) 471-6900

Facsimile: (816) 471-6642

Email: sfc@stb-law.com

mdk@stb-law.com

ATTORNEYS FOR
CITY OF LEE'S SUMMIT, MISSOURI

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November, 2006, I electronically filed the above and foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

John W. Roe, Esq. (#34878)

Mark H. Epstein, Esq. (#45401)

Colin D. Stoner, Esq. (#51202)

ROE AND EPSTEIN, LLP

920 Main Street, Suite 270

Kansas City, Missouri 64105

Telephone: 816/421-9000

Facsimile: 816/421-9001

Email: jwr@epsteinlawfirm.com

mhe@epsteinlawfirm.com

cds@epsteinlawfirm.com

Attorneys for Plaintiff

/s/ Mark D. Katz

Attorney for City of Lee's Summit, Missouri